(2)

No. 90-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DEERE & COMPANY,
Petitioner,

vs.

T. J. KENNEDY, *et al.*,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI FROM THE ILLINOIS APPELLATE COURT

FRANCIS VAN HOOREWEGHE
(Counsel of Record)
VAN HOOREWEGHE, FACKEL & THULINE
1718 - 8th Avenue
P.O. Box 399
Moline, IL 61265-0399
(309) 762-0736

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Contrary to the representation of the Petitioner, one of the issues presented for review is: Was the Appellate Court of Illinois correct in applying the de novo standard of review to the health plan in question when the specifically named fiduciary - administrator is given no discretion to interpret the terms of the plan?

2. Is the decision of the Illinois Appellate Court final under 28 U.S.C. 1257(3)?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings were the Petitioner, Deere & Company, and the Respondents, T. J. Kennedy, D.C.; Terry L. Burke d/b/a Burke Chiropractic Clinic; Michael H. W. Hurst d/b/a Hurst Chiropractic Center; Stephen Miner, D.C. d/b/a Miner Chiropractic Clinic; and James P. Woods, D.C. In the trial court, the suit of Harlow E. Wells, D.C. had been consolidated with the suits of the other respondents named above, but Wells voluntarily dismissed his suit against the Petitioner on November 16, 1984.

The subsidiaries of Deere & Company as listed by the Petitioner, while impressive, are not parties to this action.

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OPINIONS BELOW

Respondents agree to the Opinions Below as submitted by the Petitioner herein.

JURISDICTION

Respondents do not believe jurisdiction is present under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

It is necessary to make the following corrections to Petitioner's statement of the case.

On page 4, Petitioner states: "The plan administrator has the right to interpret language of the plan . . .".

The only body with authority to interpret the language is the Appeal Board.

Article 1, Section 7 of Appendix "B" states:

> "Section 7. Named Fidiciary and Plan Administrator. Deere & Company is the Named Fiduciary and the Plan Administrator and shall administer this Plan, except as otherwise specifically provided."

Article 1, Section 8 of Appendix "B" states:

> "Section 8. Amendment, Modification, and Termination. Except as otherwise specifically provided, Deere & Company may at any time amend, modify, or terminate the Plan, provided however, that no change shall reduce the amount of any benefit to which an employee, retired employee, or beneficiary shall be entitled in respect to claims incurred prior to the effective date of such change."

Article IV of Section 1, Appendix "1" A. states in part:

> "During the term of this Collective Bargaining Agreement, the Company (Defendant) shall not exercise its option under . . . (2) *Section 8* of Article 1 of the Health Benefit Plan for Hourly and Incentive Pain Employees . . . and neither party shall have the right to request changes in or additions to these Plans."

So, Defendant has waived its ability to amend or alter the plan.

Then, as Defendant acknowledges, an appeal board is established to make *binding determinations* "concerning the interpretation of the language in the aforementioned Health Benefit Plan . . ."

That appeal board consists of: "six members, two each from the international union and from Deere & Company, and one each from the respective factor and Local Union."

It also includes, when necessary, a seventh member who shall be "the permanent arbitrator designated under the Labor Agreement between the parties."

The decisions of that board "shall thereafter govern the interpretation of the language of the Health Benefit Plan." Thus, Defendant exercises *no* discretion in interpreting the language of the plan.

REASONS FOR DENYING THE WRIT

I. THE PLAN IN QUESTION GRANTS NO DISCRETION TO THE ADMINISTRATOR-FIDUCIARY. APPLYING THE PRINCIPLES OF *FIRESTONE TIRE AND RUBBER COMPANY v. BRUCH*, 489 U.S. ____, 103 S.Ct. 948, 103 L.Ed.2d 80, DE NOVO REVIEW WAS PROPER. THE RESULTING MANDATE ENFORCING THE PLAN AS WRITTEN IS NOT OF SUFFICIENT IMPORT TO DEMAND THE ATTENTION OF THIS COURT.

A. This is, and always has been, a simple case of contract construction. It is, and always has been, a request by a small group of physicians to have the Deere & Company health benefit plan enforced as written.

This is Petitioner's second attempt to involve this court in a very limited dispute. The prior unsuccessful effort was based on Petitioner's contention that the Plaintiffs, having taken assignments of benefits, had no standing to sue under E.R.I.S.A. That issue would have had more far-reaching effects than the present dispute and you correctly declined review.

Now consistent with the stated purposes of E.R.I.S.A. to diligently protect the rights of parties covered by health benefit plans; and the standards of de novo review allowed by *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. ____, 103 S.Ct. 948, 103 L.Ed.2d 80, the appellate decision enforces the plan as written.

No issues of national import engraft themselves onto this limited dispute.

B. Petitioner alleges that the court rewrote the agreement between the parties.

Contrary to this allegation what the Court found was:

1. That Deere & Company was the sole administrator -fiduciary under the plan.

The Plan states:

> "Section 7. Name Fiduciary and Plan Administrator. Deere & Company is the Named Fiduciary and the Plan Administrator and shall administer this Plan, except as otherwise specifically provided."

Under *Firestone* if the administrator-fiduciary has no discretion to interpret the plan a de novo standard of review is proper.

The Plan says:

> "Section 8. Amendment, Modification, and Termination. Except as otherise specifically provided, Deere & Company may at any time amend, modify, or terminate the Plan, provided however, that no change shall reduce the amount of any benefit to which an employee, retired employee, or beneficiary shall be entitled in respect to claims incurred prior to the effective date of such change."

Article IV of Section 1, Appendix "1" A. states in part:

> "During the term of this Collective Bargaining Agreement, the Company (Defendant) shall not exercise its option under . . . (2) *Section 8* of Article 1 of the Health Benefit Plan for Hourly and Incentive Pain Employees . . . and neither party shall have the right to request changes in or additions to these Plans."

Thus, since no discretion is granted to Deere the court's de novo review was correct.

3. The Plan as written, does not mandate the involvement of two health care professionals.

Again, the Plan states:

> "Out patient physical therapy benefits will be payable for services performed for a period of 60 treatment days when prescribed by a physician for a specified condition

> resulting from disease or injury or prescribed immediately following surgery related to the condition and when the physical therapy is performed in a nursing home or other facilities such as rehabilitation centers having comprehensive physical therapy facilities. Such services must be performed by a physician or a qualified physical therapist according to prescription from a physician concerning the nature, frequency and duration of the treatment."

This language does not require one physician to prescribe to another.

The purpose of the language "such services must be performed by a physician (or a qualified physical therapist according to a prescription from a physician concerning the nature, frequency, and duration of treatment.)" *() added*; is to comply with the law.

Physical therapists as a profession may not *prescribe* treatment--they may only *provide* treatment "according to a prescription from a physician . . ." Thus the decision enforces the Plan as written.

One can see therefore that no major clarification of *Firestone* is necessary. The decision is entirely consistent with the holdings of that case.

The decision is also consistent with the holding in *Boyd v. Trustees of the United Mine Workers Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989) at p. 59. Deferential review was granted in *Boyd* specifically because the Trustees had discretion. The alleged conflict with *Boyd* is non-existent. Petitioner cannot point to one provision giving Deere & Company, the fiduciary-administrator, discretion similar to that given the Trustees in *Boyd* . As a result, pursuant to your previous decision, a different standard of review is applicable.

C. The law of labor-management is unaffected by this decision. The parties to the plan negotiated the terms of one plan in regard to the powers of the fiduciary-administrator.

The U.A.W. apparently sought and Deere & Company was apparently satisfied to accept a plan where the fiduciary-administrator had no discretion. That being true, Defendant allowed the de novo review applied herein.

Interestingly, that review did not change the terms of the agreement, but merely applied it as written.

D. One must also remember that only one of the *two* identical plans is collectively bargained. One plan covers the hourly and incentive paid workers--this one was negotiated. The other, for salaried workers, was not negotiated. Are we to apply a different standard to the two? Certainly not.

We urge you to recall that this suit is founded in E.R.I.S.A. whose lofty purpose is to protect those covered by such plans from abuse and inconsistent application.

The decision of the Appellate Court below protects those covered by the plans, and protects best against inconsistent application of identical plan provisions.

The entire fabric of labor-management relations will not be rent if this Court refuses to review this limited decision.

II. REVIEW MAY NOT BE WARRANTED DUE TO LACK OF FINALITY.

Petitioner alleges that this Court has jurisdiction under 28 U.S.C. 1257(3) as interpreted and discussed in the first two categories classified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 569, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1974).

The language of 1257(3) speaks in terms of "final" decisions. It is clear from the decision of the Appellate Court that this dispute is far from resolved since the matter was remanded for further proceedings.

Thus unless the exceptions to ultimate finality carved out by the Court in *Cox* aid the Petitioner, the appeal should be declined.

A. The first exception is:

"In the first category are those cases in which there are further proceedings, even entire trials - yet to occur in the state courts but where for one reason or another the federal issue controls." *Cox* at 43 L.Ed. 2d 328, 340.

The ultimate determination of the remaining issue - what constitutes a "comprehensive physical therapy facility" and the reasonableness of the charges - may result in a decision that eliminates the need of further consideration of the alleged federal issue raised here.

As stated by this Court there should be "very few circumstances" where a review of state court decisions should be had in this court when something remains to be determined by the state court. *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed.2d 2092, 65 S.Ct. 1475 (1945). This is doubly true where the review is sought on a narrow issue of construction of contract language affecting only the parties involved; resulting in no national, or even statewide impact.

Principles of judicial economy are not served if you agree to review this matter.

B. The second exception has been stated as:

"Cases . . . in which the federal issue, *finally decided* by the highest court in the state, will survive and require decision regardless of the outcome of further state proceedings." *Cox* at 43 L.Ed. 2d 328, 340.

This premise is alleged by Petitioner, but they fail to illustrate how that purported issue, if it truly exists, will survive. As is shown above, this cause could well be decided on the basis of other unrelated remaining issues.

The language found in the Deere & Company health benefit plans is clearly subject to the provisions of E.R.I.S.A., and the body of case law developed around that comprehensive statute. The federal "issue" of a conflict with the law of labor-management relations is a true red herring.

Petitioner cannot truly believe that all the provisions of E.R.I.S.A. and the multitude of cases decided under it - all designed to protect the benefits given to the employee may be avoided by reference to the Labor Management Relations Act.

Obviously the cases cited by Petitioner deal with labor matters outside the purview of E.R.I.S.A. Once a health benefit plan is adopted however the broad scope of that protective act asserts itself, and all parties touched by the Plan are controlled by it.

Petitioner has for all the years of this suit trumpeted that E.R.I.S.A. controls. Now when faced with an undesirable decision under E.R.I.S.A. they seek solace in another body of law which they feel will treat them more favorably. We pray that you will not be encouraged to erode the protection provided in E.R.I.S.A., and the *Firestone* decision by this ruse.

This Petitioner has been successful in effecting piecemeal determination of the issues in this cause since 1983. It is now time to call a halt to the effort to litigate every issue in this cause separately.

III. THE CASES OF *LANDRO V. GLENDENNING MOTORWAYS, INC.*, 625 F.2D 1344 (8th CIR. 1980) AND *IN RE WHITE FARM EQUIPMENT CO.*, 788 F.2D 1186 (6th CIR. 1986) ARE NOT CASES INVOLVING COLLECTIVELY BARGAINED AGREEMENTS.

The cases of *Landro v. Glendenning Motorways, Inc.* and *In Re White Farm Equipment Co.* do not stand for the proposition cited.

Neither case deals with a collectively bargained plan.

IV. NO BASIS FOR REVIEW UNDER SUPREME COURT RULE 10 EXISTS.

The decision of the court below is not in conflict with any other state or federal court decision.

The alleged conflict with *Boyd* decision has already been addressed.

No unsettled question of federal law remains for this court to determine; and the lower decision does not conflict with any applicable decision of this court.

The relevant law is found in *Firestone*, and the lower court zealously followed the guidelines set out therein to enforce the plans as written. We respectfully request that the petition be denied.

V. CONCLUSION

Petitioner struggles to elevate this dispute to a level that would make it worthy of your consideration.

Even if jurisdiction could be found the matter is no more than a simple case of contract construction.

More serious and broad-reaching situations clamor for your attention.

We respectfully pray that this petition be denied.

Respectfully submitted,

T. J. Kennedy, D.C.;
Terry L. Burke d/b/a Burke Chiropractic Clinic;
Michael H. W. Hurst d/b/a Hurst Chiropractic Center;
Stephen Miner, D.C. d/b/a Miner Chiropractic Clinic; and
James P. Woods, D.C.

By /s/ Francis Van Hooreweghe
Attorney For Respondents
Van Hooreweghe, Fackel & Thuline
1718 - 8th Avenue, P.O. Box 399
Moline, IL 61265-0399
(309) 762-0736